IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.07.2008

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM
AND
THE HONOURABLE MR.JUSTICE R.SUBBIAH

O.S.A.NO.287 OF 2002

Fathima Majeed .. Appellant/Defendant

Vs.

Subhapratha Ravikumar .. Respondent/Plaintiff

This O.S.A. has been preferred under Clause 15 of Letters Patent and Order 36 Rule 1 of O.S. Rules against the judgment and decree made in C.S.No.733 of 1995, dated 8.2.2001.

For Appellant : Mr.T.V.Ramanujan, SC
for Mr.M.Abdul Nazeer
For Respondent : Mr.R.Anand

JUDGMENT

(The judgment of the Court was made by M.CHOCKALINGAM, J.)

Challenge is made to the judgment of the learned Single Judge made in C.S.No.733 of 1995, whereby the Court granted the relief of specific performance as asked for by the respondent/plaintiff.

2.The respondent, who sought the said relief, came with the specific allegations that the suit mentioned property belonged to the defendant; that the plaintiff desired to purchase the same; that there was an agreement entered into, as per which, the sale price was fixed at Rs.13,63,500/-; that advance of Rs.2 lakhs was paid on 04.01.1995; that the same was actually incorporated in the written agreement entered into between the parties on 06.01.1995; that the property of the defendant was originally mortgaged with Muthialpet Benefit Fund Limited and a sum of Rs.3,02,876.25 was due, which the plaintiff agreed to pay; that accordingly, by way of demand draft, that amount was paid and the mortgage was redeemed; that further, a sum of Rs.2 lakhs was paid on 25.01.1995 towards balance sale consideration and thus, in total, a sum of Rs.7,08,876.25 has been paid by the plaintiff, but the defendant, who promised to get back the original document and satisfy his marketable right to alienate the property within the stipulated time, did not do so; that despite many a demand made, the defendant did not perform her obligation either by giving the relevant documents or getting income tax

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clearance certificate and under these circumstances, the plaintiff had no option than to issue a notice calling upon the defendant to execute the sale deed, but she failed and therefore, the plaintiff had no option than to approach this court and accordingly, she made the suit.

3.The defendant/appellant came with the written statement, stating that it is true, there was an agreement entered into between the parties; that originally, there was payment of Rs.2 lakhs; that thereafter, a sum of Rs.3,02,876.25 has been paid towards the discharge of mortgage; that further a sum of Rs.2 lakhs has also been paid towards the sale consideration; that subsequently, there was a letter written by the plaintiff, stating that Rs.1,97,123.75 was the balance and also sought for acknowledgement; that the defendant lady refused to acknowledge the same; that immediately, when the cheque was placed for encashment, the plaintiff has instructed the Bankers to stop payment and accordingly, the payment was stopped; that it is not correct to say that the original documents had not been surrendered to the plaintiff; that the documents, which were mortgaged with the Muthialpet Benefit Fund Limited, on redemption, were handed over to the plaintiff and those documents were in the custody of the plaintiff; that the non production of income tax clearance certificate was nothing, but a concocted story; that the plaintiff was never ready and willing to perform her part of obligation under the agreement and under these circumstances, the plaintiff was not entitled to get the discretionary relief and hence the suit was to be dismissed.

4.On the said pleadings, four issues were framed. At the time of trial, the plaintiff examined herself as P.W.1, while the husband of the defendant was examined as D.W.1. Both sides have put forth their documentary evidence. The learned Single Judge, on trial, took the view that the plaintiff is entitled to have the relief as prayed for and decreed the suit as prayed for. Under these circumstances, this appeal has arisen.

5.Advancing arguments on behalf of the appellant, the learned Senior Counsel Mr.T.V.Ramanujan, would submit that in the instant case, though the plaintiff has averred that she was all along ready and willing to perform her part of the contract, her conduct was otherwise. Admittedly, there was an agreement between the parties on 06.01.1995, whereby the total consideration was agreed at Rs.13,63,500/-. At the time of agreement, there was payment of Rs.2 lakhs, which has also been acknowledged by way of a receipt and was also incorporated in the agreement. Thereafter, on 24.01.1995, a letter under Ex.D.4 was addressed by the plaintiff to the defendant. The contents of the letter would clearly indicate that the plaintiff had made an attempt to make payment of Rs.1,97,123.75 as the balance sale consideration and accordingly, the plaintiff did by way of annexing a cheque therefor and according to her, as per the letter, that was the balance sale consideration, while the balance was nearly about Rs.7 lakhs and odd. This letter and the cheque for Rs.1,97,123.75 would clearly indicate that the plaintiff had made an attempt to defraud, which was nothing but breach of agreement. Apart from that, the plaintiff has also made an attempt to get acknowledgement therefor, but fortunately, the defendant lady has refused the same. Immediately, while the cheque was placed for

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encashment, the plaintiff has issued a communication to the Bankers to stop payment and thus, the contents found in Ex.D.4 would indicate the conduct of the plaintiff.

6.Added further the learned Senior Counsel that if the plaintiff, who seeks the relief of specific performance, is found to be not ready and willing to perform her part of the contract as found in the agreement, then she should be nonsuited and there is no question of granting the relief, but the learned Single Judge has not adverted to any attention on those aspects, but has granted the relief and hence the judgment of the learned Single Judge has got to be set aside by allowing this appeal.

7.Contrary to the above, the learned counsel for the respondent would submit that it is true, there was an agreement entered into between the parties. Original title deeds were never handed over. The communication under Ex.D.4 cannot be put forth as defence. It is true, there was Rs.1,97,123.75, which was the balance amount and it was to be calculated. Further, in the instant case, the defendant neither gave the original document nor the income tax clearance certificate and that all along, the defendant is not willing to perform her part of the contract. Added further the learned counsel that when D.W.1, the husband of the defendant was examined in Court, he states that the defendant is willing to perform her part of the contract, provided the consideration is to be calculated at Rs.2000/- per square feet, which would actually indicate the avaricious of the defendant and the same was nothing but an attempt to get more consideration than what was actually agreed and under these circumstances, actually the defendant did not perform her part of the contract and hence the learned Single Judge was perfectly correct in granting the relief and therefore, the appeal has got to be dismissed.

8.The Court has paid its anxious consideration on the submissions made and also looked into the materials available. It is not in controversy that the appellant is the owner of the property in question; that there was an agreement entered into between the parties on 6.1.1995, as could be seen under Ex.P.1, wherein the consideration was fixed at Rs.13,63,500/-. An advance payment of Rs.2 lakhs was also made and it was also incorporated in the agreement. Thus, the balance was liable to be paid by the plaintiff. As could be seen under Ex.D.4, on 24.1.1995, there was a letter from the plaintiff. The relevant part of the letter reads as follows:

> "... We will pay the balance of Rs.1,97,125.75 being the balance sale consideration after receipt of the above mentioned documents and also an approval of the same by our advocate. Kindly proceed with your income tax clearance under Section 230 A at the earliest so that we can complete the transaction."

A reading of the said part of the communication under Ex.D.4 would clearly reveal that according to the plaintiff, the balance was Rs.1,97,125.75 only. But, except the payment already made, the balance was actually Rs.7 lakhs and odd. 9.It is further to be pointed out that the plaintiff has also sought for acknowledgement from the

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defendant, but she refused to make so. Admittedly, Ex.D.4 letter was sent along with cheque for a sum of Rs.2 lakhs. But the letter was not acknowledged by the defendant. It is further curious to note that the plaintiff has not stopped her conduct with that, but she has sent an another cheque for Rs.1,97,123.75 under Ex.D.2, which was the amount referred to in Ex.D.4. The plaintiff has issued a communication to the bankers to stop payment. All would go to show that the plaintiff was persistent to see that the balance sale consideration was Rs.1,97,123.75 only. Though it is averred in the plaint that the plaintiff was ready and willing to perform her part of the contract, the conduct of the plaintiff was otherwise. The mere statement either in the notice or in the plaint, seeking the relief of specific performance, would not be sufficient, but it has got to be shown from the conduct of the parties. In the instant case, the conduct of the plaintiff would clearly indicate that she was not at all ready and willing to perform her part of the contract as agreed between the parties and as incorporated in the agreement entered into between the parties.

10.In a given case like this where the plaintiff came forward with the relief of specific performance, she must show not only by pleadings, but also by her conduct that she is ready and willing to perform her part of the contract. This court is able to see that the plaintiff is not ready and willing to perform her part of the contract as it is understood by law. Under these circumstances, the plaintiff cannot get the relief of specific performance as asked for by her. The contentions put forth by the learned counsel for the respondent/plaintiff, though attractive, will not stand the scrutiny of law. Hence the respondent/plaintiff is not entitled to get the relief.

11.It is true, the plaintiff has not asked for any alternative relief of recovery of money. Though it was not asked for, since it is for the relief of specific performance, on the ground of equity, the Court can order so. Accordingly, the defendant is directed to make payment of Rs.7,02,876.25 (Rupees seven lakhs two thousand eight hundred and seventy six and twenty five paise only) to the plaintiff within a period of three months and those amount carries interest at the rate of 12% per annum from the respective dates of payments by the plaintiff to the defendant, till realisation. On payment of the entire amount, as stated above, the plaintiff is directed to hand over all the title deeds, which were originally handed over to her, to the defendant. The judgment and decree made in C.S.No.733 of 1995 are set aside. Accordingly, this O.S.A. is disposed of. No costs.

Sd/
Deputy Registrar

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Sub Asst.Registrar

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To

The Sub Assistant Registrar,
Original Side,
High Court, Madras.

2 cc To Mr.V.Anand, Advocate, SR.33773.

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